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No. 07-662

IN THE SUPREME COURT OF THE UNITED STATES

AARP, JACK W. MACMILLAN, FRANK H. SMITH, JR, FRANK A. WHEELER, FRED DOCHAT, GERALD FOWLER, M. ELAINE CLAY, et al.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1/]

NELA is the only professional membership organization in the country comprised of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who represent thousands of individuals who have been victims of unlawful employment discrimination.

NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has a compelling interest in insuring that the goals of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* are fully realized.

To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and the federal appellate courts regarding the proper interpretation of the ADEA . *See, e.g., Smith v. City of Jackson*, 544 U.S. 228 (2005); *Adams v. Florida Power Co.*, 535 U.S. 228 (2002).

[1/] Pursuant to Supreme Court Rule 37.2, NELA notified the parties of i's intent to file an *amicus curiae* brief in this case more than ten days before the filing of the brief. The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amicus curiae* NELA states that no counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

NELA submits that the petition should be granted because the Third Circuit applied an analysis that wholly conflicts with and dramatically alters the framework of *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984) and the decisions of appellate courts. That analysis focused on the statutory delegation provision rather than examining the ADEA's substantive prohibitions and defenses to determine whether the EEOC's exemption is contrary to congressional intent. The approach of the Third Circuit results in complete deference to agency regulations without any meaningful inquiry into whether the regulation conflicts with the substantive provisions of the statute. This approach effectively negates the import of the well-established *Chevron* standards.

CORPORATE DISCLOSURE STATEMENT

The National Employment Lawyers Association (NELA) is a nonprofit membership organization of attorneys who represent working individuals. NELA is not a publicly traded corporation, and has no parent or subsidiary corporations which are publicly traded.

SUMMARY OF ARGUMENT

The issue presented is whether a court determining the validity of an agency regulation must focus on the substantive terms of a statute or can rely exclusively on the rulemaking delegation provision of the statute. NELA urges the entire Court to grant the petition because the Third Circuit's opinion creates a framework that conflicts with the standards set forth

in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

Until the decision below, all courts had applied step one of the *Chevron* analysis by construing the substantive terms of the relevant statute. For the first time, the decision below took a contrary approach and construed the provision granting the agency regulatory authority in applying the first step of the *Chevron* framework. The appellate court's sole focus on the rulemaking provision in ADEA Section 9, 29 U.S.C. §628, and utter disregard for the substantive provisions in ADEA Section 4, 29 U.S.C. § 623, distorts the *Chevron* framework and leads to alarming results.

ARGUMENT

I. THE THIRD CIRCUIT'S EXCLUSIVE RELIANCE ON THE DELEGATION OF REGULATORY AUTHORITY DRAMATICALLY REVISES THE *CHEVRON* FRAMEWORK.

When an agency regulation is challenged, the framework of *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), directs the court to examine whether Congress has considered the issue in question, or instead has left a gap which the agency may reasonably fill with regulations.

First, under step one, the court must "ask whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, (1984). If

Congress has directly addressed the question presented, that is the end of the matter. *Id.* at 842-43.

Courts proceed to step two of the *Chevron* framework only if the statute is ambiguous. Under step two, a court asks whether the regulation is permissible, meaning it is within the agency's authority and is a reasonable construction. "[T]he agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."*Chevron*, at 843-844.

While the Third Circuit articulated the well-established *Chevron* framework, it dramatically revised it by collapsing the two-steps into one question – whether Congress intended to permit exemptions under ADEA Section 9.[2/] App. at 11-A.

The Third Circuit appears to have created a new approach to the *Chevron* framework in two dramatic ways. First, according to the Third Circuit, courts can rely exclusively on the statutory delegation to the agency to issue regulations to answer whether Congress has spoken to "the precise question at issue" under *Chevron* step one.

[2/] Section 9 of the ADEA, 29 U.S.C. §628, permits the EEOC to issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. §628.

Second, the Third Circuit held that courts need not find any ambiguity in Congress' intent on the issue in question to permit the agency to regulate. The Third Circuit held that "we do not find, as did the District Court, that ambiguity must be present in the ADEA for the EEOC to exercise its authority under section 9." *Id.* The Third Circuit's approach constitutes a dramatic revision to this Court's *Chevron* framework.[3/]

Under the Third Circuit's approach, the "precise question at issue" refers to the agency's regulatory authority, not the particular subject of the regulation and whether Congress has addressed that substantive content in any other provisions of the statute. According to the Third Circuit, a court need not inquire into whether the substantive terms of the statute explicitly prohibit the very conduct being regulated. It need not consider whether the agency's action conflicts with congressional intent on the substantive content of the statute. Under this approach, a court's inquiry ends based solely on the breadth and clarity of the agency's authority to issue regulations.

The Third Circuit's framework makes the most important aspect of the *Chevron* analysis meaningless — to determine congressional intent on the question.. It is the regulation being challenged that directs the reviewing court to the relevant substantive provisions

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[3/] Until the Third Circuit's decision below, no court had focused exclusively on the rulemaking delegation at *Chevron* step one. See the Petition for Certiorari of the AARP at pp. 14-16 for a detailed discussion of the circuit court cases that properly examine the substantive provisions of statutes under *Chevron* step one, which NELA's Brief will not repeat.

of the statute. To determine whether Congress has addressed the "precise question at issue," a court must scrutinize the entire statute, particularly its substantive and definitional terms, prohibitions, and defenses.

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002), illustrates that courts look to the congressional delegation in a statute only to insure that the agency had authority to issue regulations, not to answer the "precise question at issue" in *Chevron* step one.

In *Ragsdale*, the Court considered the validity of a regulation that leave taken by an employee does not count against the employee's Family and Medical Leave Act entitlement if the employer did not designate the leave as FMLA leave. The Court noted that the Secretary of Labor had clear authority from Congress to issue regulations "necessary to carry out" the Act under 29 U.S.C. §2654. 535 U.S. at 86. The Court then examined the substantive sections of the FMLA, such as the general grant of rights in 29 U.S.C. § 2612(a)(1), § 2614(c)(1), and § 2612(b)(1), the employer's obligation to reinstate the employee upon her return to work under §2614(a)(1), the prohibitions in §2615(a)(1), and the damages provisions for FMLA violations in §2617(a)(1). *Id.* The Court held that although the regulation was within the Secretary's authority, it was contrary to the substantive provisions of the FMLA.

The Court's analysis of the substantive provisions of the FMLA in *Ragsdale* exemplifies the purpose of step one of the *Chevron* framework — to determine whether Congress has considered the content of the

regulation being challenged. In no case applying the *Chevron* framework has this Court suggested that the delegation of regulatory authority exclusively determines whether Congress has addressed the "precise issue at question." Under *Chevron* step one, the "precise issue at question" has always referred to the subject matter of the regulation being challenged. If *Chevron* step one was determined only by the scope of the delegation provision without detailed consideration of the rest of the statute, courts would be hamstrung in examining whether Congress had addressed the specific issue in other parts of the statute.

The district court below twice framed the issue in this case as whether the ADEA prohibits the cessation of health care benefits based on age. *See* App. 37-A. The Court of Appeals below rejected this formulation and any inquiry into the substantive terms of the statute. Indeed, the Third Circuit held that it did not need to find any ambiguity or gaps in the statute to permit the agency to issue regulations. App. at 11-A.

Under the *Chevron* framework, a finding that the statute is ambiguous on the issue in question opens the door for agencies to regulate within the statutory gap. Here, the Third Circuit's approach turns *Chevron* on its head, by finding that the clarity of the statutory delegation permits the regulation. But a finding that the statute is clear under *Chevron* means the agency cannot regulate — the opposite of the Third Circuit's approach and conclusion.

The delegation granting EEOC authority to issue regulations may be clear, but so too is the clarity of

Congress' intent to prohibit the very conduct that the regulation permits — discrimination in employee benefits. The answer to the "precise issue at question" presented by the challenged regulation is that Congress has directly addressed the issue, which means the door is closed to agency regulation on that issue.

In order to reconcile its finding that the statute was clear but that the agency could still regulate with the *Chevron* framework, the Third Circuit cursorily notes that the regulation is not contrary to the statute. App. 7-A, n.12. This would appear to fall under step two of the *Chevron* framework. But in making this finding the Third Circuit did not consider the ADEA's broad definition including "all employee benefits" in Section 11(l), 29 U.S.C. §630(l), its prohibitions in Section 4(a)(1), 29 U.S.C. §623(a)(1), its defenses in Section 4(f)(2)(B)(i), 29 U.S.C. §623(f)(2)(B)(i), and its exceptions that explicitly deal with health benefits, 29 U.S.C. §§ 623(l)(2)(A)(i), (l)(2)(D), and (l)(2)(E).

It is unfathomable that this Court in creating a framework for examining the validity of an agency's construction of a statute would allow lower courts to wholly ignore the substantive content of the statute. It is equally unfathomable that Congress would have delegated such broad authority to an agency to override clear congressional directives in statutory prohibitions. The more logical construction is that Congress limited EEOC's authority to those issues and areas that Congress did not clearly or expressly address in the ADEA. This construction harmonizes the step one framework of *Chevron* as the Court devised it, and adheres to congressional intent in the

fulfillment of both ADEA Section 4 and ADEA Section 9, 29 U.S.C. §§ 623, 628.

II. THE THIRD CIRCUIT'S REVISED APPROACH TO *CHEVRON* ALLOWS AGENCIES TO LEGISLATE CONTRARY TO CONGRESSIONAL INTENT.

The Third Circuit's approach is exactly what the government seeks in this case — the unfettered ability to issue regulations and exemptions without meaningful judicial oversight. The government seeks absolute deference to agency regulations, including exemptions, that conflict with the clear meaning of a statute's prohibitions and with congressional intent.

This approach and its result are necessary in this particular case because the EEOC has consistently acknowledged that the ADEA plainly prohibits the cessation of health benefits based on age. App. 37-A. As an *amicus* in support of the retirees in *Erie County Retirees Assoc. v. The County of Erie,* 220 F.3d, 210 (3d Cir.), and throughout the litigation of this case, the EEOC has repeatedly declared that the ADEA prohibits the type of discrimination that the exemption would permit. The EEOC has stated: "[p]lainly, the ADEA covers discrimination in the provision of post-employment benefits."

EEOC has also consistently advocated that individuals do not lose their ADEA protections when they retire, arguing that "any other view of the statute would lead to irrational gaps in coverage that Congress could not have intended." More precisely, EEOC argued:

> It is inconceivable that Congress would in the same breath expressly prohibit discrimination in employee benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees at or after their retirement, although they had earned those employee benefits through years of service with the employer.

Erie County Retirees Assoc. v. The County of Erie, 220 F.3d at 210 (citing EEOC br. at 16-17).

Not only is it inconceivable that Congress would have permitted discrimination in health benefits under the ADEA, it is inconceivable that Congress would allow EEOC to use its regulatory authority to issue an exemption that accomplishes the same result. In its amicus brief in *Erie County*, the EEOC argued that "Congress did not intend, in general, to exempt discrimination in retiree health benefits from the reach of the statute." *Erie County Retirees Assoc. v. The County of Erie*, 2000 WL 33983611, *28 (3d Cir. 2000). Yet that is precisely what the EEOC's exemption does.

Given the clarity of the ADEA's coverage of discrimination in health benefits and the EEOC's constant confirmation of that statutory construction, it is no surprise that the EEOC's exemption could not satisfy step one of the *Chevron* framework if the Third Circuit properly focused on the ADEA's substantive prohibitions and defenses. While the district court below twice rejected the government's attempts to redirect the court's inquiry under *Chevron* step one, the Third Circuit adopted this misguided approach.

The EEOC has attempted to legislate, not regulate, by exempting post-employment health benefits from coverage under the ADEA when the statute clearly prohibits such conduct. While NELA acknowledges the concern that employers may cease to provide retiree health benefits if they are not permitted to cut costs by excluding individuals based on age, speculation about the provision of voluntary employee benefits should never support an exemption from the law's clear requirements. Yet that is the effect of the Third Circuit's revised approach to *Chevron*.

The solution to this difficult issue is not to exempt an entire *class* of individuals or benefits from the ADEA. As the EEOC forcefully argued in its *amicus* brief in *Erie County*:

> The answer to this conundrum, however, is not to arbitrarily exclude a group of individuals from the protection of the statute. The answer is for the employer either to rely upon distinctions that are not age-based or to structure any age-based distinctions in a manner that comports with the ADEA's "equal cost/equal benefit" rule.... Employers, concerned with the costs of providing health care insurance to their employees, can structure their health insurance plans in a way that will reduce costs and still comport with the ADEA's requirements.

Erie County Retirees Assoc. v. The County of Erie, 2000 WL 33983611, *30 (3d Cir. 2000).

Granted the provision of health benefits presents complicated and costly issues for employers. The same can be said for pension and other benefits. Obviously employers would prefer to eliminate compliance with the ADEA as one of their concerns on this issue. But if cost or complications or the likelihood that employers would no longer provide a benefit were allowed to support an agency's exempting entire categories of benefits, then the EEOC could also exempt other benefits from the ADEA's coverage, regardless of whether Congress has mandated ADEA coverage for such benefits. Surely this cannot be the approach or the result Congress intended.

CONCLUSION

NELA respectfully submits that the petition for certiorari be granted.

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RESPECTFULLY SUBMITTED,

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